



# UNITED STATES PATENT AND TRADEMARK OFFICE

UNITED STATES DEPARTMENT OF COMMERCE  
United States Patent and Trademark Office  
Address: COMMISSIONER FOR PATENTS  
P.O. Box 1450  
Alexandria, Virginia 22313-1450  
www.uspto.gov

APPLICATION NO.	FILING DATE	FIRST NAMED INVENTOR	ATTORNEY DOCKET NO.	CONFIRMATION NO.
10/597,909	07/25/2007	Alan D. Olstein	21001.012US	7773

25005 7590 01/13/2011

Intellectual Property Dept.  
Dewitt Ross & Stevens SC  
2 East Mifflin Street  
Suite 600  
Madison, WI 53703-2865

EXAMINER
----------

MARX, IRENE

ART UNIT	PAPER NUMBER
----------	--------------

1651

NOTIFICATION DATE	DELIVERY MODE
-------------------	---------------

01/13/2011

ELECTRONIC

**Please find below and/or attached an Office communication concerning this application or proceeding.**

The time period for reply, if any, is set in the attached communication.

Notice of the Office communication was sent electronically on above-indicated "Notification Date" to the following e-mail address(es):

docket-ip@dewittross.com

### **Response to Arguments**

Applicant's arguments have been fully considered but they are not deemed to be persuasive.

Regarding the combinations of various antibiotics in Claim 15, even though the prior art does not specifically include all of the recited antibiotics, there is nothing in the claim regarding concentrations, for example. Therefore, the significance of the addition of further antibiotics to a culture medium in traces, for example, has not been substantiated on this record. The mere inclusion of nitrofurantoin in trace amounts or would not patentably distinguish over the references, since the selectivity of the medium cannot be readily assessed in light of the functional limitation of "in concentrations effective to promote growth of *Listeria* spp. and to inhibit growth of non-*Listeria* organisms." There is no clear indication on this record that the mere inclusion of all of these compounds will have the required effect.

It is also of interest to note that in the as-filed specification it is acknowledged that the concentration of nitrofurantoin is important to selectivity. See, e.g.,

[0024] Nitrofurantoin is an antibiotic with significant anti-microbial activity against many potential gram-positive competitors. Nitrofurantoin has been shown to be effective at concentrations from about one to two orders of magnitude lower than the minimum inhibitory concentration for *Listeria* spp. (Soriano, Safdar).

This shows that the effectiveness of at least nitrofurantoin in a selective medium is critically dependent on the concentration used.

Regarding the argument that Neamatallah et al. do not provide nitrofurantoin in the culture medium for *Listeria*, it is noted with all due respect that the effect on bacteria of antibiotic discs on agar plates containing bacteria is predicated on the diffusion of the antibiotic into the medium. Therefore, the antibiotic nitrofurantoin is included in the medium for *Listeria* upon provision of the disc to the mediumt in the Neamatallah et al. reference at some concentration. It cannot be assessed whether the concentration is or is not greater than the about 0.006 g/l of nitrofurantoin added in claims 30 and 31, since nitrofurantoin is provided in a localized concentration.

Therefore the rejection is deemed proper and it is adhered to.

Art Unit: 1651

Any inquiry concerning this communication or earlier communications from the examiner should be directed to Irene Marx whose telephone number is (571) 272-0919. The examiner can normally be reached on M-F (6:30-3:00).

If attempts to reach the examiner by telephone are unsuccessful, the examiner's supervisor, Michael G. Wityshyn can be reached on 571-272-0926. The fax phone number for the organization where this application or proceeding is assigned is 571-273-8300 .

Information regarding the status of an application may be obtained from the Patent Application Information Retrieval (PAIR) system. Status information for published applications may be obtained from either Private PAIR or Public PAIR. Status information for unpublished applications is available through Private PAIR only. For more information about the PAIR system, see <http://pair-direct.uspto.gov>. Should you have questions on access to the Private PAIR system, contact the Electronic Business Center (EBC) at 866-217-9197 (toll-free).

/Irene Marx/  
Primary Examiner  
Art Unit 1651